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United States Senate

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2011 MAY 23 AZ04 MAY 19 A 16

May 12, 2011

Christopher Hughey
Federal Election Commission
Acting General Counsel
999 E Street, N.W.
Washington, D.C. 20463

SENSITIVE

Re: Referral of Matters Arising from the
Preliminary Inquiry of Senator John Ensign

PRE-MUR # 520

Dear Mr. Hughey:

The Committee conducted a preliminary inquiry into allegations that former Senator John Ensign violated federal law and Senate rules, and engaged in improper conduct that reflects on the Senate. In the course of its inquiry, the Committee discovered information giving it reason to believe that Senator Ensign and others violated laws, including those that fall within the Federal Election Commission's jurisdiction.

Under Supplementary Procedural Rule 7(a), the Committee "shall" report to the proper authorities whenever it has reason to believe that a violation of law may have occurred.

Accordingly, the Committee refers the enclosed summary and evidentiary materials showing that Senator Ensign and others violated campaign finance laws and made possible false statements to the Commission.

Please advise the Committee if we may be of any further assistance.

Sincerely,


Barbara Boxer
Chairman


Johnny Isakson
Vice Chairman

cc: J. Duane Pugh
Director of Congressional, Legislative and
Intergovernmental Affairs
Federal Election Commission

Enclosures

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First General Counsel Report, MUR 6200 (Mar. 31, 2010)	24
FEC Statement of Reasons, MUR 6200 (Nov. 17, 2010)	25

TABLE OF CONTENTS

DOCUMENTS

Tab.

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In the matter of: Senator John Ensign
Ensign for Senate
Battle Born Political Action
Committee

OFFICE OF GENERAL
COUNSEL
MUR No. 6200

SENSITIVE

COMPLAINT

1. Citizens for Responsibility and Ethics in Washington ("CREW") and Melanie Sloan bring this complaint before the Federal Election Commission ("FEC") seeking an immediate investigation and enforcement action against Senator John Ensign, Ensign for Senate and the Battle Born Political Action Committee for direct and serious violations of the Federal Election Campaign Act ("FECA").

Complainant

2. Complainant CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the right of citizens to be informed about the activities of government officials and to ensuring the integrity of government officials. CREW is dedicated to empowering citizens to have an influential voice in government decisions and in the governmental decision-making process. CREW uses a combination of research, litigation, and advocacy to advance its mission.

3. In furtherance of its mission, CREW seeks to expose unethical and illegal conduct of those involved in government. One way CREW does this is by educating citizens regarding the integrity of the electoral process and our system of government. Toward this end, CREW monitors the campaign finance activities of those who run for federal office and publicizes those who violate federal campaign finance laws. Through its website, press releases and other methods of distribution, CREW also files complaints with the FEC when it discovers violations of the FECA. Publicizing campaign finance

violators and filing complaints with the FEC serves CREW's mission of keeping the public informed about individuals and entities who violate campaign finance laws and deterring future violations of campaign finance law.

4. In order to assess whether an individual, candidate, political committee or other regulated entity is complying with federal campaign finance law, CREW needs the information contained in receipts and disbursements reports that political committees must file pursuant to the FECA, 2 U.S.C. § 434(a)(2); 11 C.F.R. § 104.1. CREW is hindered in its programmatic activity when an individual, candidate, political committee or other regulated entity fails to disclose campaign finance information in reports of receipts and disbursements required by the FECA.

5. CREW relies on the FEC's proper administration of the FECA's reporting requirements because the FECA-mandated reports of receipts and disbursements are the only source of information CREW can use to determine if a candidate, political committee or other regulated entity is complying with the FECA. The proper administration of the FECA's reporting requirements includes mandating that all reports of receipts and disbursements required by the FECA are properly and timely filed with the FEC. CREW is hindered in its programmatic activity when the FEC fails to properly administer the FECA's reporting requirements.

6. Complainant Melanie Sloan is the executive director of Citizens for Responsibility and Ethics in Washington, a citizen of the United States and a registered voter and resident of the District of Columbia. As a registered voter, Ms. Sloan is entitled to receive information contained in reports of receipts and disbursements required by the FECA, 2 U.S.C. § 434(a)(2); 11 C.F.R. § 104.1. Ms. Sloan is harmed when a candidate, political committee or other regulated entity fails to report campaign finance activity as required by the FECA. See FEC v. Akins, 524 U.S. 11,

19 (1998), quoting Buckley v. Valeo, 424 U.S. 1, 66-67 (1976) (political committees must disclose contributors and expenditures to help voters understand who provides which candidates with financial support). Ms. Sloan is are further harmed when the FEC fails to properly administer the FECA's reporting requirements, limiting their ability to review campaign finance information.

Respondents

7. John Ensign is a United States Senator representing the State of Nevada. Ensign for Senate is Senator John Ensign's principal campaign committee. The Battle Born Political Action Committee is Senator John Ensign's leadership PAC.

Factual Allegations

8. Cynthia L. Hampton served as the treasurer of Ensign for Senate from February 23, 2007 until on or about May 20, 2008. Ms. Hampton also served as treasurer of the Battle Born Political Action Committee from February 12, 2008 until on or about May 20, 2008. On or about May 28, 2008, Ms. Hampton was terminated from her positions as treasurer of Ensign for Senate and the Battle Born Political Action Committee by Senator John Ensign. At some point thereafter, Senator John Ensign paid Ms. Hampton an unknown amount of money out of his own pocket as a severance payment in recognition of her termination as the treasurer of Ensign for Senate and the Battle Born Political Action Committee. See Rutenberg and Fries, *After Affair, Senator Resigns Leadership Job*, N.Y. Times, June 13, 2009 attached hereto as Exhibit A. The severance payment by Senator John Ensign to Ms. Hampton was not reported to the Federal Election Commission by either Ensign for Senate or the Battle Born Political Action Committee.

COUNT I

9. FECA defines the term "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). The

term also includes "the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." 2 U.S.C. § 431(8)(A)(ii). FEC regulations further define the phrase "anything of value" in 2 U.S.C. § 431(8)(A)(i) to include "all in-kind contributions." 11 C.F.R. § 100.52(d)(1). All political committees, including principal campaign committees and leadership PACs, are required to report to the Federal Election Commission the identity of any person who makes a contribution, including an in-kind contribution, that exceeds \$200 within a calendar year. 2 U.S.C. § 434(b)(3)(A); 11 C.F.R. § 104.13.

10. The severance payment by Senator John Ensign to Ms. Hampton constituted an in-kind contribution by Senator Ensign to both Ensign for Senate and the Battle Born Political Action Committee. By failing to report this in-kind contribution, both Ensign for Senate and the Battle Born Political Action Committee violated 2 U.S.C. § 434(b)(3)(A) and 11 C.F.R. § 104.13.

CONJUNT II

11. FECA prohibits any individual, including the sponsor of a leadership PAC, from contributing more than \$5,000 in a calendar year to a leadership PAC. 2 U.S.C. § 441a(a)(1)(C). To the extent that the severance payment by Senator John Ensign to Ms. Hampton in recognition of her terminations as the treasurer of the Battle Born Political Action Committee exceeded \$5,000, Senator John Ensign violated 2 U.S.C. § 441a(a)(1)(C).

CONCLUSION

WHEREFORE, Citizens for Responsibility and Ethics in Washington and Melanie Sloan request that the Federal Election Commission conduct an investigation into these allegations, declare the respondents to have violated the Federal Election Campaign

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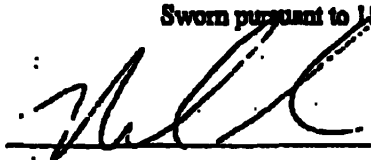
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Act and applicable FEC regulations, and impose sanctions appropriate to these violations and take such further action as may be appropriate.

Verification

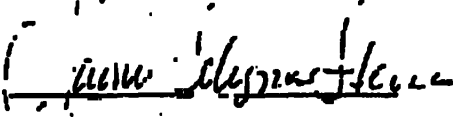
Citizens for Responsibility and Ethics in Washington and Melanie Sloan hereby verify that the statements made in the attached Complaint are, upon information and belief, true.

Sworn pursuant to 18 U.S.C. § 1001.



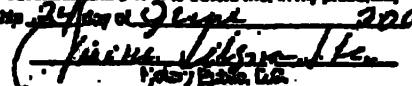
Melanie Sloan

Sworn to and subscribed before me this 24th day of June, 2009.



Notary Public

NADINE SELIGMAN REINER
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires June 30, 2011

District of Columbia: SS
Subscribed and sworn to before me, in my presence,
on the 24 day of June, 2009

My commission expires June 30, 2011

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OFFICE OF GENERAL
COUNSEL

EXHIBIT A

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June 18, 2009

After Affair, Senator Resigns Leadership Job

By ~~ANNA KATZ~~ and STEVE FRISER

WASHINGTON — Senator John Ensign of Nevada resigned his position as the fourth-ranking Republican leader in the Senate on Wednesday after publicly confessing to an extramarital affair with a former staff member.

It was another blow to his party, but one that Senate Republicans hoped would help shield the party's leadership from the senator's embarrassing marital issues.

Mr. Ensign, whose current term does not expire until 2012, will retain his Senate seat.

The news was announced midday Wednesday by the Republican leader in the Senate, Mitch McConnell of Kentucky, who must now find a successor to Mr. Ensign as chairman of the Republican Senate Policy Committee, which helps set the party's legislative agenda.

"He's accepted responsibility for his actions and apologized to his family and constituents," Mr. McConnell said in a statement. "He offered, and I accepted, his resignation as chairman of the policy committee."

Republican officials said they were hopeful that Mr. Ensign, considered a future star of the party, would have enough time to make amends with voters in his home state and recoup some of his luster; before he announced his affair on Tuesday, he had been considered a potential contender for the presidency in 2012.

But Republican officials were also wary of potentially troubling signs that the issue would remain in the public realm for some time.

Late Wednesday, Daniel Albrecht, a Las Vegas lawyer, said he was representing the woman with whom Mr. Ensign had the affair, his former political aide Cindy Hampton, and her husband, Doug Hampton, who served as an aide to Mr. Ensign in the Senate at the time of the affair.

In a statement, Mr. Albrecht said, "It is unfortunate the senator chose to air this very personal matter, especially after the Hamptons did everything possible to keep this matter private."

"In time," he added, "the Hamptons will be ready and willing to tell their side of the story."

Mr. Albrecht and the Hamptons did not respond to detailed messages asking about statements by people close to Mr. Ensign in Nevada and Washington that Mr. Hampton was seeking a large sum of money and that upon refusing him, Mr. Ensign decided to go public with the affair.

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A spokesman for the Federal Bureau of Investigation, Dave Staratz, said the bureau was not investigating the accusations.

A person close to Mr. Ensign's family, who spoke only on condition of anonymity, said the senator had confessed the affair to his wife many months ago and, upon reconciling with her and attending counseling, dismissed Ms. Hampton from his political team with a severance that he paid from his own pocket.

A spokesman for Mr. Ensign would not respond in a request for comment on the matter.

Officials at the National Republican Senatorial Committee had no comment on election records that showed that the Hamptons' son, Brandon Hampton, had worked at the committee as a researcher when Mr. Ensign was its chairman and during the same period as the affair.

Federal Election Commission records show he was paid \$5,400 from March to August of 2008.

A spokeswoman for Mr. Ensign who was also at the committee at the time, Rebecca Fisher, did not return a call seeking comment.

Jim Rittenberg reported from Washington, and Steve Price from Las Vegas.

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999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

NOTE: 6260

DATE COMPLAINT FILED: June 24, 2009

DATE OF NOTIFICATION: June 30, 2009

LAST RESPONSE RECEIVED: Aug. 18, 2009

DATE ACTIVATED: September 1, 2009

EXPIRATION OF SOL: Earliest April 7, 2013
Latest July 13, 2013

COMPLAINANT:

Melania Hamel-Citizens for Responsibility and
Ethics in Washington

RESPONDENTS:

Senator John Ensign
Michael and Sharon Ensign
Ensign for Senate and Lisa Lisker,
as treasurer¹
Battle Born Political Action Committee and
Lisa Lisker, as treasurer

RELEVANT STATUTES:

2 U.S.C. § 431(5)(A)(ii)
2 U.S.C. § 434(b)
2 U.S.C. § 441a

INTERNAL REPORTS CHECKED:

FEC Disclosure Reports
Senate Financial Disclosure Report

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The complaint and amended complaint filed by Citizens for Responsibility and Ethics in
Washington ("CREW") alleges that on April 7, 2008, transfer of money to Cynthia Hampton, then
the treasurer of Ensign for Senate ("the Committee"), the authorized campaign committee for

¹ Cynthia Hampton was the treasurer of Ensign for Senate and the Battle Born PAC at the time that the payments at
issue were made, but was replaced by Lisa Lisker in both positions.

1 Senator John Ensign, and the treasurer of Senator John Ensign's leadership PAC,² the Battle
2 Born Political Action Committee, ("the PAC"), constituted a severance payment and was thus an
3 excessive and unreported contribution made to, and received by, the Committee and the PAC, in
4 violation of 2 U.S.C. §§ 434(b)(3), 441a(d), and 441a(f). Michael and Sharon Ensign ("the
5 Ensigns"), parents of Senator John Ensign, transferred the money about a month before Ms.
6 Hampton left her treasurer position and shortly after the disclosure of a personal relationship
7 between Senator Ensign and Ms. Hampton to their families. Supplemental Complaint at 1-2.
8 The transfer at issue consists of a \$96,000 check from the Ensigns' trust account made out to the
9 Hampton family, including Cynthia Hampton, her husband Doug, and two of their three children.
10 See Committee Response, Exhibit A (copy of canceled \$96,000 check).

11 The Committee, the PAC, and Michael Ensign filed largely similar responses. The
12 responses assert that the transfers to the Hampton family were gifts from the Ensigns, not a
13 severance payment related to the termination of Cynthia Hampton's position with the
14 Committee and the PAC. See Ensign for Senate Response at 2-3, Battle Born PAC Response at
15 2-3, and Michael Ensign Response at 2-3. The responses state that the gifts were given "out of
16 concern for the well-being of long-time family friends" after the Ensigns were informed of the
17 relationship between their son and Ms. Hampton. *Id.*

18 As further discussed below, and based on available information, it appears that there is
19 reason to believe that at least part of the \$96,000 transfer was a severance payment to Ms.
20 Hampton, and thus was an excessive contribution from Michael and Sharon Ensign. Further, this
21 transaction was not reported by the Committee or the PAC. An investigation into this matter is

² A leadership PAC is a political committee that is directly or indirectly established, organized, maintained or controlled by a candidate or an individual holding federal office, but is not an authorized committee of the candidate or officeholder and is not affiliated with an authorized committee of a candidate or officeholder.

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1 warranted to resolve questions raised by the conflicting available information. Thus, this Office
2 recommends that the Commission find reason to believe that 1) Michael and Sharon Ensign
3 made, and Ensign for Senate and Lisa Lister, in her official capacity as treasurer, and the Battle
4 Born PAC and Lisa Lister, in her official capacity as treasurer, accepted certain contributions;
5 and 2) that the Committee and the PAC failed to report the contributions from the Ensigns. We
6 further recommend that the Commission authorize compulsory process, as necessary.

7 **II. FACTUAL AND LEGAL ANALYSIS**

8 **A. Factual History**

9 The initial complaint in this matter alleged that, according to news reports, Senator John
10 Ensign paid Cynthia Hampton "an unknown amount of money out of his own pocket as a
11 severance payment" after the May 20, 2008, termination of her employment as the treasurer of
12 Ensign for Senate and as treasurer of Ensign's Battle Born Political Action Committee.
13 Complaint at 3, *see also* Jim Rutenberg and Steve Friess, *After Relationship, Senator Resigns*
14 *Leadership Job*, NEW YORK TIMES, June 18, 2009 (Complaint Exhibit A). CREW alleged that
15 this "severance payment" was an undisclosed in-kind contribution from Ensign to the Committee
16 and an undisclosed and excessive in-kind contribution from Ensign to the PAC. Complaint at 4.
17 Therefore, CREW's original complaint alleged violations of 2 U.S.C. §§ 434(b)(3)(A) and
18 441a(a)(1) by Ensign, Ensign for Senate and Lisa Lister, in her official capacity as treasurer, and
19 the Battle Born Political Action Committee and Lisa Lister, in her official capacity as treasurer.
20 *Id.* at 3-4.

21 A supplement to the Complaint, following additional details revealed in the press, alleged
22 that, rather than the unquantified "severance payment" from Ensign discussed in the original
23 Complaint, it appeared that Ensign's parents, Michael and Sharon Ensign, made a transfer to

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1 Cynthia Hampton's family totaling \$96,000 in April 2008, prior to her dismissal from her
2 treasurer positions in May 2008. Supplemental Complaint at 1. Of this \$96,000, CREW alleges
3 that a portion was paid to Cynthia Hampton "as a severance payment for the loss of her positions
4 as treasurer," and "may constitute illegal excessive in-kind contributions by the Ensigns to both
5 Ensign for Senate and the Battle Born PAC" in violation of 2 U.S.C. §§ 441a(a) and 441a(f).
6 Supplemental Complaint at 2; see also Don Eggen and Chris Cillizza, *Ensign's Parents Made*
7 *Payments to Mistress, Her Family*, WASHINGTON POST, July 10, 2009 (Supplemental Complaint
8 Exhibit A)¹; Al Kamen, *Hillary Clinton, Back After a Break*, WASHINGTON POST, July 15, 2009
9 (Supplemental Complaint Exhibit B). Further, the Supplement notes that neither the Committee
10 nor the PAC reported receiving "any ... contributions from either Michael or Sharon Ensign."
11 Supplemental Complaint at 2. The Eggen/Cillizza article, Supplemental Complaint Exhibit A,
12 questions whether "the \$96,000 in payments to the Hampton family might be viewed as a way
13 around campaign rules that require reporting severance payments for employees." CREW
14 therefore alleges that the Committee and the PAC's failure to report the contribution was a
15 violation of 2 U.S.C. § 434(b)(3)(A).

16 The Committee, the PAC, and Michael Ensign filed very similar responses. Senator
17 Ensign and his mother, Sharon Ensign, did not respond, though each provided a sworn affidavit
18 accompanying the other responses. The responses state that Ensign's mother and father each
19 provided four members of the Hampton family with a gift of \$12,000 (total gifts to each of the
20 four Hamptons were \$24,000 each, for a total of \$96,000 from Michael and Sharon Ensign).
21 Ensign for Senate Response at 2. The gift of \$96,000 was made in one check dated April 7,

¹ This WASHINGTON POST article reported that the \$96,000 was disbursed in eight separate checks of \$12,000 each, citing Paul Coggins, Sen. Ensign's attorney. *Id.* That representation is contradicted by the press release issued by Coggins on July 9, 2009 (reproduced at Supplemental Complaint at 1) and by Ensign for Senate Response Exhibit A (a copy of the annotated single check for \$96,000).

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1 2008, made out to Doug, Cynthia, and their sons, Brandon and Blake Hampton. Ensign for
2 Senate Response at Exhibit A (copy of canceled check). The responses state that the Ensigns
3 gave the gifts "out of concern for the well-being of long-time family friends" when the Ensigns
4 were informed of the relationship between their son and Cynthia Hampton. Ensign for Senate
5 Response at 2 and 3. The Ensigns wanted to give a \$100,000 gift, but instead gave \$96,000
6 because two multiple \$12,000 gifts would fit within the maximum permitted tax-free gift limit
7 under IRS gift tax rules. *Id.* at 3-4.

8 Both Michael and Sharon Ensign submitted sworn affidavits stating that they did not
9 intend the gifts to the Hampton family to be severance payments to Cynthia Hampton, and these
10 gifts were part of a pattern of significant financial gifts from the Ensign family (largely from
11 Senator Ensign and his wife, Darlene Ensign) to the Hamptons over the years. See Parents'
12 Affidavits at ¶¶ 3-6,⁴ attached unsigned as Exhibits B and C to the Ensign for Senate Responses,
13 and later filed in signed and sworn form with the Commission on August 12, 2009. The Ensigns
14 also state that neither their son nor anyone else asked them to make these gifts, nor did the
15 Senator or anyone else suggest that these payments should function as severance payments to
16 Cynthia Hampton or her husband Doug. *Id.* at ¶¶, and also signed affidavit of John Ensign, filed
17 with the Commission on August 18, 2009 (same). The responses also assert that the allegation
18 that the payment was a severance payment to Cynthia Hampton is "bolled by the fact that the
19 amount of the gifts would equal almost two full years of Cindy Hampton's salary -- an
20 excessively disproportionate amount that is not indicative of a severance package." Ensign for
21 Senate Response at 5.

⁴ Michael and Sharon Ensign's affidavits are essentially identical except for additional statements in Michael Ensign's affidavit regarding the method of payment from the family trust, and will be referred to as "Parents' Affidavits" collectively.

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1 The responses surmise that CREW and others were misled as to the source, amount, and
2 purpose of the payments to Cynthia Hampton by the media's reliance on an anonymous
3 statement and a misquotation of Sen. Ensign's communications director, Terry Mazzola, when
4 Mazzola attempted to dispute media reporting discussing an alleged severance payment. The
5 anonymous statement, included in the article attached to the Complaint as Complaint Exhibit A
6 (referred to above), stated that someone close to the Ensign family said that the Senator had
7 disclosed the relationship to his wife and had attended counseling with her, and thereafter
8 "disbursed Ms. Hampton from his political team with a severance that he paid from his own
9 pocket." See Ensign for Senate Response at 5,² see also Complaint Exhibit A. Respondents
10 state that the anonymous statement is directly contradicted by the sworn affidavits of the Ensigns
11 and Senator Ensign. See Ensign for Senate Response at 5.

12 The alleged misquotation of Mazzola occurred after his effort to clarify a disputed factual
13 issue in a July 13, 2009, article in the Washington Post. The Washington Post ran an article on
14 July 10, 2009, that discussed the \$96,000 transfer from Ensign's parents, but also stated "[t]he
15 disclosure came a day after Douglas Hampton alleged that Ensign gave his wife a \$25,000
16 severance payment." Supplemental Complaint Exhibit A. On July 13, a regular Washington
17 Post column, in the *Local*, commented that "[t]here's still the matter of an alleged severance
18 payment to Cynthia Hampton by Ensign of at least \$25,000. That payment was not reported, as
19 required by law, to the Federal Election Commission." Al Kamen, *The Senate's Got Talent, and*
20 *Then Some*, WASHINGTON POST, July 13, 2009 (Ensign for Senate response Exhibit Q).
21 Although the responses state that Mazzola contacted the Post to dispute the assertion that there

² The responses indicate that this quote is from an unidentified June 21, 2009 New York Times article, but the quote is actually from the June 18, 2009 New York Times article that was Complaint Exhibit A.

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1 was a separate severance payment, and that some portion of the \$96,000 "gift" constituted a
2 severance payment, the responses assert that the Post's reporting of the payment did not convey
3 that there was not a separate \$23,000 payment, nor was any portion of the \$96,000 transfer a
4 severance payment. See Ensign for Senate's Responses at 6-7, Hable Kern PAC's Responses at 6-
5 7.

6 Respondents also state that "the gifts to the Hamptons are entirely consistent with the
7 Ensigns' past pattern of generosity -- all of which occurred while Cindy Hampton served as
8 Treasurer to the Committee." Ensign for Senate Response at 3. Respondents detailed gifts and
9 financial support from John and Darlene Ensign to the Hamptons dating back to 2004, including
10 a 2004 loan of \$15,000 that was repaid without interest, a \$25,000 loan in 2006 that was never
11 repaid, \$15,170 in 2006 for private school tuition for the Hampton children, \$4,500 for
12 counseling for one of the Hampton children, another \$23,970 in private school tuition in 2007,
13 and a \$28,080 loan that was verbally forgiven. See Ensign for Senate Response at 3. The
14 Responses also note that prior to the \$96,000 transfer, Michael and Sharon Ensign included the
15 Hamptons in a 2006 Hawaiian vacation via private jet, which was also attended by John and
16 Darlene Ensign and their children. *Id.* Respondents claim the value of this trip was over
17 \$30,000. Parents' Affidavits at 75.⁶ Combining the single previous gift from Michael and

⁶ The documentation supporting the claim that Michael and Sharon Ensign provided the Hamptons with the gift appears to establish that such a trip took place, but does not clearly indicate that the parents paid its costs. In fact, there is some indication that John Ensign, at least initially, incurred some of the costs. For instance, an invoice for \$2,262.00 from vendor Pure Mind states "Bill to John Ensign." See Hable Kern PAC's Responses Exhibit L. A charge for \$2,262.00 from Pure Mind appears on a credit card statement, but the cardholder's name has been redacted. See Hable Kern PAC's Responses Exhibit K. A reasonable inference can be drawn that this credit card statement belongs to John Ensign, because in addition to the Pure Mind charge, the statement contains, *inter alia*, a charge for \$1,361.97 from the restaurant Spago Maui dated December 27, 2006. *Id.* According to its history for the trip, the card at Spago Maui was swiped by John and Sharon Ensign and the Hamptons, but not by Michael and Darlene Ensign. See Hable Kern PAC's Responses Exhibit M. Presumably, someone in attendance at the dinner paid the charges on his or her credit card. In addition, Michael and Sharon Ensign were not listed on the history as present at any other meals on this trip. *Id.*

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1 Sharon Ensign with the financial support from John and Darlene Ensign, the Responses assert
2 that the \$96,000 transfer from the Ensigs to the Hamptons was merely one in a pattern of
3 significant gifts from the Ensign family to the Hamptons. Ensign Born PAC Response at 3.

4 The New York Times published an article on October 2, 2009, based on interviews with
5 the Hamptons, in which the Hamptons described a plan that Mr. Hampton and Ensign worked on
6 in late February 2008 under which Ensign would help Doug Hampton line up lobbying clients in
7 exchange for him leaving his job with Ensign's Senate office. See Eric Lichtblau and Eric
8 Lipton, *Senator's Aid After Relationship Raises Flags Over Ethics*, New York Times, October
9 2, 2009 ("Lichtblau Lipton article")
10 (http://www.nytimes.com/2009/10/02/us/politics/02ensign.html?_r=1&scp=1&st=Ensign%20His
11 <mailto:nytimes.com>, last visited January 15, 2010). This article states that "[s]oon after [working out
12 the deal for Doug Hampton's new job], Mr. Ensign called the Hamptons separately. Cynthia
13 Hampton, he said, would have to leave her \$48,000 a year campaign job, while her husband
14 would have to quit as planned. But as severance, the senator said he and his wife would give the
15 Hamptons a check for about \$100,000, Mr. Hampton said." *Id.* at 6.

16 Linked to the online version of the Lichtblau Lipton article were images of documents
17 that the Hamptons turned over to the New York Times. On the issue of the payment made to the
18 Hampton family, Mr. Hampton provided his handwritten notes from the phone call detailed
19 above. These notes, dated "4/2/08" and written on Ensign office stationery, read: "Exit strategy
20 and severance for Cindy, Exit strategy and severance for Doug, Communication Plan for NRSC
21 and official office, NO CONTACT WHAT SO EVER WITH CINDY!" Lichtblau Lipton article
22 Exhibit 3, ([http://documents.nytimes.com/a-wake-of-ethics-senator-ensign-may-have-violated-](http://documents.nytimes.com/a-wake-of-ethics-senator-ensign-may-have-violated)
23 nytimes.com, last visited January 15, 2010) (attached here as Exhibit 1). Another

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1 exhibit to the online article was a page of handwritten notes entitled "Record of discussions with
2 John Ensign." This page details what Doug Hampton represents are notes from three phone
3 conversations with John Ensign on April 2. Notes of the first call, which was at 9:40 a.m.,
4 include information similar to that discussed above, and it appears to be the same phone call.
5 The second call was at noon, and the notes detail further discussions of a plan for a new job for
6 Doug Hampton, including that "[w]e discussed timing of departure IR agreed for me to stay on
7 thru April - Better for client building." The third call was at 7:30 p.m., with the notes stating
8 "John called asked if it was OK to show the outline of a plan. - Doug - 2 min. sevenmin,
9 continue client building; - Cindy - 1 year salary; - Discussed gift rules and tax law; - Shared a
10 plan to have both he and Darlene write ch's in various amounts equaling \$6K. - He asked if the
11 offer was OK and did I agree - I said I would need to think about [sic] and would get back with
12 him." Lichstein Lipton article Exhibit 3, ([http://documents.nytimes.com/in-wake-of-affair-](http://documents.nytimes.com/in-wake-of-affair-senator-enigma-may-have-violated-no-ethics-law-2009-05)
13 [senator-enigma-may-have-violated-no-ethics-law-2009-05](http://documents.nytimes.com/in-wake-of-affair-senator-enigma-may-have-violated-no-ethics-law-2009-05), last visited January 13, 2010) (attached
14 here as Exhibit 2). The article continued that "Mr. Ensign's lawyer in June [2009], however,
15 called the \$96,000 payment that was ultimately made a tax-free gift from Mr. Ensign's parents to
16 the Hamptons 'out of concern for the well-being of longtime family friends during a difficult
17 time'" Lichstein Lipton article.

18 Mr. Hampton has reiterated his assertion that the \$96,000 payment was a surrogacy
19 payment, most notably in a November 23, 2009 interview on the television program "Nightline"
20 and an accompanying article published on ABC News' website
21 (<http://abcnews.go.com/print?id=2140788>, last visited on January 14, 2010). In that article, the
22 payment was discussed as follows: "The Ensign family has said the \$96,000 was a gift and not
23 surrogacy... Hampton told 'Nightline' the opposite, saying it was 'crystal clear' that the \$96,000

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was, in fact, severance and not a gift. 'Crystal clear,' Hampton said. 'I took notes. I've shared those notes. They're well documented. They were clearly what he deemed as severance.'"

B. Legal Analysis

A third party's payment of a political committee's administrative expenses, such as the salary of a political committee's employee, results in a contribution to the political committee. A "contribution" includes any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for federal office, or payment by any person of compensation for personal services rendered by another person without charge to a political committee for any purpose. 2 U.S.C. § 431(f)(A).⁷ No person may make a contribution to any candidate and his or her authorized political committee with respect to any election for federal office that exceeds \$2,000 (adjusted for inflation). 2 U.S.C. §§ 441a(a)(1)(A). No person may contribute more than \$5,000 per year to a leadership PAC, such as the Battle Born PAC. 2 U.S.C. § 441a(a)(1)(C). Knowing receipt of any excessive contribution is a violation of 2 U.S.C. § 441a(f). Failure to report receiving a contribution is a violation of 2 U.S.C. § 454(b).

⁷ See *California Medical Association v. F.E.C.*, 453 U.S. 182, 199, 20. 19 (1981) (plurality opinion):

[C]ontributions for administrative support clearly fall within the scope of donations limited by § 441a(a)(1)(C). Appellants contend, however, that because these contributions are earmarked for administrative support, they lack any potential for corrupting the political process. We disagree. If unlimited contributions for administrative support are permissible, individuals and groups ... could completely dominate the operations and contribution patterns of independent political committees.

While this quoted language is from the section of the opinion joined by only a plurality of Justices, the concurring opinion and the dissent differ from the plurality on other grounds not contradictory to the position taken here. See *Cal. Med.*, 453 U.S. at 201-208. Justice, in *Colorado Republican Federal Campaign Comm. v. F.E.C.* seven Justices cited to *Cal. Med.*, including the position cited here, for the proposition that the Court has previously upheld such contribution limits to PACs. See *Colorado Republican Federal Campaign Comm. v. F.E.C.*, 518 U.S. 604, 617 (1996) (plurality opinion), and 518 U.S. at 628 (Justice Kennedy, Chief Justice Rehnquist, and Justice Scalia concurring in the judgment and dissenting in part).

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1 If a portion of the money transferred by the Ensigns to the Hamptons paid administrative
2 costs of the Committee or the PAC, then the amount exceeding the contribution limits would be
3 an excessive contribution, and the failure to report the receipt constitutes a reporting violation.
4 See 2 U.S.C. §§ 441a(a) and 4344b. According to the Hamptons' assertions, Ensign obligated
5 himself, the Committee, and the PAC to make a severance payment to Cynthia Hampton in
6 exchange for her leaving her jobs with the Committee and the PAC. A severance payment, by its
7 nature, is a payment at the time of a job termination in lieu of salary payments.⁹ Just as the
8 Committee and the PAC properly paid Cynthia Hampton's salary for her treasurer jobs, if she
9 received a severance payment, such payment would be the responsibility of the Committee and
10 the PAC, or if it was paid by a contributor, would have to be reported as a contribution and fall
11 within the contribution limits. See *Cal. Med.*, *supra*. (discussing administrative costs, which
12 include compensation for staff as contributions if paid by a third party). If the information that
13 the Hamptons have shared with the media is correct, a severance payment for Cynthia Hampton
14 appears to be part of an effort to provide both Cynthia and Doug Hampton a measure of
15 compensation for the loss of their jobs – Ensign aided Doug Hampton in getting a new job, and
16 rather than finding Cynthia Hampton a new job, she received a severance payment.

17 There appears to be a question of fact as to whether the payments to the Hampton family
18 constituted severance. The responses and affidavits deny that the payment to the Hampton
19 family constituted severance. See Ensign for Senate Response at 1, 4-5; Battle Born PAC
20 Response at 1, 4-5; Parents' Affidavits at ¶¶ 6, 8. Further, the Responses of the Committee and
21 the PAC directly deny that the monies transferred to the Hampton family by Ensign's parents

⁹ Merriam Webster's online dictionary defines "severance pay" as "an allowance usually based on length of service that is payable to an employee on termination of employment." See <http://www.merriam-webster.com/dictionary/severance%20pay> (last visited January 24, 2010).

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1 were related to Cynthia Hampton's employment, "nor were they related to any expenses or debt
2 that the Committee would have otherwise incurred." Ensign for Senate Response at 7; Battle
3 Born PAC Response at 7. While in the October 2 New York Times article the Hamptons
4 represented that they were originally told that they would receive money directly from Ensign as
5 severance payments to Cynthia Hampton, Ensign never transferred money directly to the
6 Hamptons during this period. See Lichblum Lipton article. In addition, the response argues that
7 the amount of the payment makes it an unlikely severance payment (see response at 5-6 and Ensign
8 for Senate Response at 5).

9 On the other hand, the Hamptons have alleged that Ensign promised them severance
10 payments equal to a year of salary for Cindy Hampton (plus additional payments for Doug
11 Hampton) in exchange for leaving her jobs after her improper relationship with Ensign became
12 known to both families. See Complaint exhibits, *supra*, Lichblum Lipton article, *supra*, and
13 Nightline program and ABC News article, *supra*. As represented in Doug Hampton's notes, it
14 appears that the alleged severance payments that Ensign offered were very detailed. Hampton's
15 notes include that on the day that Ensign first suggested this severance plan, he discussed a
16 \$96,000 figure and the need to comply with gift tax laws. Ensign's parents made a payment of
17 \$96,000, in a fashion that complied with IRS gift tax laws, five days after the April 2, 2008,
18 phone call. While the Committee and the PAC could have paid severance to Cynthia Hampton
19 without regard for the contribution limits, the Ensigns, in making the payments on their own,
20 would have been required to limit their contributions to the Committee and the PAC to the
21 maximum allowable 2008 contribution of \$2,300 each to the Committee and \$5,000 each to the
22 PAC. The \$96,000 payment therefore could be an excessive contribution from the Ensigns of as
23 much as \$81,400, (\$96,000 - \$14,600), in violation of 2 U.S.C. §§ 441a(a)(1)(A) and (C), and the

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1 Committee and the PAC's receipt of these excessive contributions would be a violation of
2 2 U.S.C. § 441a(f).⁹ Similarly, if the payment constituted severance, it appears that the
3 Committee and the PAC would have been required to disclose such excessive in-kind
4 contributions on its contributions and expenditures schedules in accordance with
5 11 C.F.R. § 104.13(a), and the failure to do so would constitute a violation of 2 U.S.C. § 434(b).

6 Given that the Hampton's description of the facts appears to be supported by
7 contemporaneous documentation, there is reason to believe that the payment the Ensign made
8 may have been severance instead of part of a pattern of giving to the Hamptons. Further, any
9 pattern of giving to the Hamptons appears to have been made by the Senator and his wife—not
10 the Senator's parents—who appear to have given all the prior gifts except the trip to Hawaii.
11 With respect to the trip to Hawaii, there is information that suggests that the Senator and his wife
12 may have paid some of the expenses associated with that trip as well.¹⁰

13 The conflict between the Hampton's representation of the events leading up to Cynthia
14 Hampton's departure from her job and the respondents' explanation of the purpose of the
15 payment suggests that an investigation is warranted to determine whether the Ensign violated

⁹ There are some important distinctions between this matter and previous Commission matters involving personal gifts to candidates, see, e.g., MUR 5138 (Ferguson), MUR 5321 (Jesse Robins), MUR 5724 (Feldman), and MUR 6104 (Montgomery). First, in these "personal gift" cases, the Commission considered whether the gifts from a parent to a child who was also a candidate were the candidate's personal funds or excessive contributions to the child's campaign by examining whether there was a previously existing pattern of giving from the parents to the candidate. See 11 C.F.R. § 110.10(d)(2) ("personal funds" are "gifts of a personal nature which had been customarily received prior to the beginning of the election cycle"). The respondents attempt to establish a pattern of giving from the Ensign family to the Hamptons, but all but two of the prior gifts were made by the Senator and his wife, not his parents. Second, none of the past cases appears to have involved personal benefits provided to a candidate's leadership PAC or even a candidate's contributions to his or her leadership PAC as subject to limitations. See 2 U.S.C. § 441a(f)(1)(C). Third, the instant matter presents disclosure failures not present in the other matters. As the payment from Ensign's parents went to Cynthia Hampton and her family, not to Ensign, and did not pass through Commission accounts at any point, this matter is different from past cases because at no point were any transactions disclosed. Had the Ensigns given their son funds to give to his authorized committee to pay Cynthia Hampton as alleged severance, the payment would have been reported on disclosure reports.

¹⁰ See Exhibit 6 (information provided by respondents suggests Senator Ensign may have paid approximately \$10,500 of this amount.)

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1 the Act by making excessive contributions, and whether the Committee and the PAC violated the
2 Act by accepting them and failing to disclose them. Thus, this Office recommends that the
3 Commission find reason to believe that Michael and Sharon Ensign made, and Ensign for Senate
4 and Lisa Lickert, in her official capacity as treasurer, and the Battle Born Political Action
5 Committee and Lisa Lickert, in her official capacity as treasurer, received excessive
6 contributions; and that the Ensign for Senate Committee and the Battle Born Political Action
7 Committee failed to disclose the contributions. We recommend that the Commission take no
8 action at this time as to Senator Ensign because the information shows that the parents, not the
9 Senator, made the \$96,000 payment, and we need to investigate the circumstances of this
10 payment. Thus, we also recommend that the Commission pursue an investigation into this
11 matter.

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21
22 Therefore, we recommend that the Commission
23 authorize the use of compulsory process.

IV. **RECOMMENDATIONS**

1. Find reason to believe that Michael and Sharon Ensign violated 2 U.S.C. §§ 441a(a);
2. Find reason to believe that Ensign for Senate and Lisa Lisker, in her official capacity as treasurer, and the Battle Born Political Action Committee and Lisa Lisker, in her official capacity as treasurer, violated 2 U.S.C. § 441a(f);
3. Find reason to believe that Ensign for Senate and Lisa Lisker, in her official capacity as treasurer, and the Battle Born Political Action Committee and Lisa Lisker, in her official capacity as treasurer, violated 2 U.S.C. § 434(b);
4. Take no action at this time as to Senator John Ensign;
5. Authorize the use of compulsory process as to all Respondents and witnesses in this matter, including the issuance of appropriate interrogatories, document subpoenas, and deposition subpoenas, as necessary;
6. Approve the attached Factual and Legal Analysis;
7. Approve the appropriate letters.

Thomasina Duncan
General Counsel

3/31/10
Date

BY:

Stephen Gira
Stephen Gira
Deputy Associate General Counsel

Peter G. Blumberg
Peter G. Blumberg
Assistant General Counsel

Audra Hale-Maddox
Audra Hale-Maddox
Attorney

Attachments:

MUR 6200 (Ensign)
First General Counsel's Report
Page 16 of 16

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

VIA CERTIFIED MAIL AND FACSIMILE
RETURN RECEIPT REQUESTED

Melanie Sloan
Citizens for Responsibility
and Ethics in Washington
1400 Eye Street, N.W., Suite 450
Washington, D.C. 20005

RE: MUR 6200

Dear Ms. Sloan:

On June 24, 2009, the Federal Election Commission received your complaint alleging possible violations of the Federal Election Campaign Act of 1971, as amended ("the Act") by Senator John Ensign, Michael and Sharon Ensign, the Ensign for Senate Committee and Lisa Lisker, in her official capacity as treasurer, and the Battle Born PAC and Lisa Lisker, in her official capacity as treasurer. Based on the complaint and the response, the Commission, on November 16, 2010, voted to dismiss this matter and close the file. A Statement of Reasons providing a basis for the Commission's decision is enclosed.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 12, 2003).

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

If you have any questions, please contact Audra Hale-Maddox, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg".

Peter G. Blumberg
Assistant General Counsel

Enclosure
Statement of Reasons

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

) MUR 6200

Senator John Ensign; Michael and
 Sharon Ensign; Ensign for Senate and
 Lisa Lisker, as treasurer; Battle Born
 Political Action Committee and Lisa
 Lisker, as treasurer

CERTIFICATION

I, Shawn Woodhead Werth, recording secretary for the Federal Election Commission executive session on November 16, 2010, do hereby certify that the Commission decided by a vote of 5-0 to take the following actions in MUR 6200:

1. Dismiss the complaint in MUR 6200 on the basis of prosecutorial discretion pursuant to Hickler v. Cheney, 470 U.S. 821 (1985).
2. Adopt the Statement of Reasons as previously circulated.
3. Approve the appropriate letters.
4. Close the file.

Commissioners Bauerly, Hunter, McGahn II, Petersen, and Weintraub voted affirmatively for the decision. Commissioner Walther recused himself with respect to this matter and did not vote.

Attest:

November 18, 2010
 Date

Shawn Woodhead Werth
 Shawn Woodhead Werth
 Secretary and Clerk of the Commission

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FEDERAL ELECTION COMMISSION

In the Matter of)

Senator John Ensign)

MUR 6200

Michael and Sharon Ensign)

Ensign for Senate and Lisa Lisker,)

in her official capacity as treasurer)

Battle Born Political Action Committee)

and Lisa Lisker in her official capacity)

as treasurer)

STATEMENT OF REASONS

Chairman **MATTHEW S. PETERSEN**, Vice Chair **CYNTHIA L. BAUERLY**,
Commissioners **CAROLINE C. HUNTER**, **DONALD F. McGAHN II**,
and **ELLEN L. WEINTRAUB**

I. INTRODUCTION

This matter arises out of a complaint, subsequently amended, alleging that on April 7, 2008 payment to Cynthia Hampton and her family constituted severance and was thus an excessive and unreported contribution made to, and received by, both Ensign for Senate ("the Committee"), the authorized campaign committee for Senator John Ensign, and Senator John Ensign's leadership PAC,¹ the Battle Born Political Action Committee, ("the PAC"), in violation of 2 U.S.C. §§ 434(b)(3), 441a(a), and 441a(f). Ms. Hampton was the treasurer of the Committee and the PAC at the time of the payment. Michael and Sharon Ensign ("the Ensigns"), parents of Senator John Ensign, made the payment to Ms. Hampton and her family approximately one month before she left her treasurer positions and shortly after it was disclosed to the families of Senator Ensign and Ms. Hampton that the two had had a personal relationship. Supplemental Complaint at 1-2. The payment at

¹ A leadership PAC is a political committee that is directly or indirectly established, financed, maintained or controlled by a candidate or an individual holding federal office, but is not an authorized committee of the candidate or officeholder and is not affiliated with an authorized committee of a candidate or officeholder. 2 U.S.C. § 434(f)(3)(B).

1 issue consists of a \$96,000 check from the Ensigns' trust account made payable to
2 Cynthia Hampton, her husband Doug, and two of their three children. See Committee
3 Response, Exhibit A (copy of canceled \$96,000 check).

4 Based on the available information and for the reasons discussed below, on
5 November 16, 2010, we voted to dismiss this matter as a matter of prosecutorial
6 discretion and closed the file. See *Knicker v. Chazoy*, 470 U.S. 821, 831 (1985).

7 **II. FACTS**

8 The Complaint and Supplemental Complaint alleged that the Ensigns made a
9 payment to Cynthia Hampton's family totaling \$96,000 in April 2008, before she
10 resigned her treasurer positions in May 2008. Supplemental Complaint at 1. Of this
11 \$96,000, the complaint alleges that a portion was paid to Cynthia Hampton "as a
12 severance payment for the loss of her positions as treasurer," and "may constitute illegal
13 excessive in-kind contributions by the Ensigns to both Ensign for Senate and the Battle
14 Born PAC" in violation of 2 U.S.C. §§ 441a(a) and 441a(b). Supplemental Complaint at
15 2; see also Dan Eggen and Chris Cillizza, *Ensign's Parents made Payments to Infamous*,
16 *Her Family*, WASHINGTON POST, July 10, 2009 (Supplemental Complaint Exhibit A);² Al
17 Kamen, *Hillary Clinton, Back After a Break*, WASHINGTON POST, July 15, 2009
18 (Supplemental Complaint Exhibit B). Further, the complaint notes that neither the
19 Committee nor the PAC reported receiving "any ... contributions from either Michael or
20 Sharon Ensign." Supplemental Complaint at 2. The complaint, therefore, concludes that

² This WASHINGTON POST article reported that the \$96,000 was disbursed in eight separate checks of \$12,000 each, citing Paul Coggins, Sen. Ensign's attorney. *Id.* That representation is contradicted by the press release Coggins issued on July 9, 2009 (referenced at Supplemental Complaint at 1) and by the Ensign for Senate Response Exhibit A (a copy of the canceled single check for \$96,000).

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1 the Committee and the PAC's failures to report the contributions were violations of
2 2 U.S.C. § 434(b)(3)(A).

3 The Committee, the PAC, and Michael Ensign each filed similar responses to the
4 complaint. Senator Ensign and his mother, Sharon Ensign, did not respond, though each
5 provided a sworn affidavit accompanying the other responses. The responses state that
6 Senator Ensign's mother and father each provided four members of the Hampton family
7 with a gift of \$12,000 (i.e., the individual Hampton family members received \$24,000
8 each, for a total of \$96,000 from Michael and Sharon Ensign). Ensign for Senate
9 Response at 2. The gift of \$96,000 was made in one check dated April 7, 2008, made
10 payable to Doug, Cynthia, and their sons, Brandon and Blake Hampton. Ensign for
11 Senate Response at Exhibit A (copy of canceled check). The responses state that the
12 Ensigns gave the gifts "out of concern for the well-being of long-time family friends"
13 after the Ensigns were informed of the relationship between their son and Cynthia
14 Hampton. Ensign for Senate Response at 2 and 3. The Ensigns wanted to give a
15 \$100,000 gift, but instead gave \$96,000 because the multiple \$12,000 gifts would fit
16 within the maximum permitted tax-free gift limits under IRS gift tax rules. *Id.* at 3-4.

17 Both Michael and Sharon Ensign submitted sworn affidavits stating that they did
18 not intend the gifts to the Hampton family to be severance to Cynthia Hampton, and that
19 these gifts were part of a pattern of significant financial gifts from the Ensign family
20 (largely from Senator Ensign and his wife, Darlene Ensign) to the Hamptons over several

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1 years. See Parents' Affidavits at ¶¶ 5-6.³ Michael and Sharon Ensign also state that
2 neither their son nor anyone else asked them to make these gifts, nor did the Senator or
3 anyone else suggest that these payments should function as severance to Cynthia
4 Hampton or her husband Doug. *Id.* at ¶ 8; see also Signed Affidavit of John Ensign, filed
5 with the Commission on August 18, 2009. The responses also assert that the allegation
6 that the payment was severance to Cynthia Hampton is "belied by the fact that the
7 amount of the gifts would equal almost two full years of Cindy Hampton's salary – an
8 excessively disproportionate amount that is not indicative of a severance package."
9 Ensign for Senate Response at 5.

10 The responses argue that the complainant was misled as to the source, amount,
11 and purpose of the payments to Cynthia Hampton by the media's reliance on an
12 anonymous statement and a misquotation of Senator Ensign's communications director,
13 Tory Mazzola. The anonymous statement indicated that someone close to the Ensign
14 family said that the Senator had disclosed the relationship to his wife and had attended
15 counseling with her, and thereafter "dismissed Ms. Hampton from his political team with
16 a severance that he paid from his own pocket." See Ensign for Senate Response at 5; see
17 also Complaint Exhibit A. Respondents state that the anonymous statement is directly
18 contradicted by the sworn affidavits of the Ensigns and Senator Ensign. See Ensign for
19 Senate Response at 5.

³ Michael and Sharon Ensign's affidavits are essentially identical except for additional statements in Michael Ensign's affidavit regarding the method of payment from the family trust, and will be referred to as "Parents' Affidavits" collectively. The affidavits were attached unsigned as Exhibits B and C to the Ensign for Senate Response, and later filed in signed and sworn form with the Commission on August 12, 2009.

1 The alleged misquotation of Mazzola occurred after his effort to clarify a disputed
2 factual issue in a July 13, 2009, article in the Washington Post. The Washington Post
3 published an article on July 10, 2009, that discussed the \$96,000 transfer from Ensign's
4 parents, but that also stated "[t]he disclosure comes a day after Douglas Hampton alleged
5 that Ensign gave his wife a \$25,000 severance payment." Supplemental Complaint
6 Exhibit A. On July 13, a regular Washington Post column, *In the Loop*, commented that
7 "[t]here's still the matter of an alleged severance payment to Cynthia Hampton by Ensign
8 of at least \$25,000. That payment was not reported, as required by law, to the Federal
9 Election Commission." Al Kamen, *The Senate's Got Talent, and Then Some*,
10 WASHINGTON POST, July 13, 2009 (Ensign for Senate Response Exhibit Q). Although
11 the responses state that Mazzola contacted the Post to dispute the assertion that there was
12 a separate severance payment, and that some portion of the \$96,000 "gift" constituted a
13 severance payment, the responses assert that the Post's subsequent reporting on the issue
14 did not convey Mazzola's clarifications. See Ensign for Senate's Response at 6-7; Battle
15 Born PAC's Response at 6-7.

16 Respondents also assert that "the gifts to the Hamptons are entirely consistent
17 with the Ensigns' past pattern of generosity -- all of which occurred while Cindy
18 Hampton served as Treasurer to the Committee." Ensign for Senate Response at 5.
19 Respondents detailed gifts and financial support from John and Darlene Ensign to the
20 Hamptons dating back to 2004, including the following: 1) a 2004 loan of \$15,000 that
21 was repaid without interest; 2) a \$25,000 loan in 2006 that was never repaid; 3) \$15,170
22 in 2006 for private school tuition for the Hampton children; 4) \$4,500 for counseling for
23 one of the Hampton children; 5) \$23,970 in private school tuition in 2007; and 6) a

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1 \$20,000 loan that was verbally forgiven. See Ensign for Senate Response at 3. The
2 Responses also note that prior to the \$96,000 payment, Michael and Sharon Ensign
3 included the Hamptons in a vacation via private jet to Hawaii that they valued at over
4 \$30,000. *Id.* Parents' Affidavits at ¶ 5. In light of this history, the Responses assert that
5 the \$96,000 payment from the Ensigns to the Hamptons was merely one in a pattern of
6 significant gifts from the Ensign family to the Hamptons. Battle Born PAC Response at
7 3.

8 However, publicly available information suggests that the Hamptons viewed the
9 \$96,000 as a severance payment and not as a gift. The New York Times published an
10 article on October 1, 2009, based on interviews with the Hamptons, in which the
11 Hamptons described a plan that Mr. Hampton and Ensign worked on in late February
12 2008 under which Ensign would help Doug Hampton line up lobbying clients in
13 exchange for him leaving his job with Ensign's Senate office. See Eric Lichtblau and
14 Eric Lipton, *Senator's Aid After Relationship Raises Flags Over Ethics*, NEW YORK
15 TIMES, October 2, 2009 ("Lichtblau Lipton article").
16 ([http://www.nytimes.com/2009/10/02/us/politics/02ensign.html?_r=1&scp=1&sq=Ensign](http://www.nytimes.com/2009/10/02/us/politics/02ensign.html?_r=1&scp=1&sq=Ensign%20Hampton&st=cse)
17 [%20Hampton&st=cse](#), last visited January 15, 2010). This article states that "[s]oon after
18 [working out the deal for Doug Hampton's new job], Mr. Ensign called the Hamptons
19 separately. Cynthia Hampton, he said, would have to leave her \$48,000 a year campaign
20 job, while her husband would have to quit as planned. But as severance, the senator said
21 he and his wife would give the Hamptons a check for about \$100,000, Ms. Hampton
22 said." *Id.* at 6.

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1 Linked to the online version of the Lichtblau Lipton article were images of
2 documents that the Hamptons turned over to the New York Times. On the issue of the
3 payment made to the Hampton family, Mr. Hampton provided what he contended were
4 his handwritten notes from the phone call detailed above that appear to discuss possible
5 severance payments for Doug and Cynthia Hampton. These notes, dated "4/2/08" and
6 written on Ensign office stationery, read: "Exit strategy and severance for Cindy, Exit
7 strategy and severance for Doug, Communication Plan for NRSC and official office, NO
8 CONTACT WHAT SO EVER WITH CINDY!" Lichtblau Lipton article Exhibit 3,
9 ([http://documents.nytimes.com/in-wake-of-affair-senator-ensign-may-have-violated-an-](http://documents.nytimes.com/in-wake-of-affair-senator-ensign-may-have-violated-an-ethics-law-2#p=3)
10 [ethics-law-2#p=3](http://documents.nytimes.com/in-wake-of-affair-senator-ensign-may-have-violated-an-ethics-law-2#p=3), last visited January 15, 2010).

11 Another exhibit to the online article was a page of handwritten notes entitled
12 "Record of discussions with John Ensign." This page details what Doug Hampton
13 represents are notes from three phone conversations with John Ensign on April 2. Notes
14 of the first call, which was at 9:40 a.m., include information similar to that discussed
15 above, and it appears to be the same phone call. The second call was at noon, and the
16 notes detail further discussions of a plan for a new job for Doug Hampton, including that
17 "[w]e discussed timing of departure IE agreed for me to stay on thru April - Better for
18 client building." The third call was at 7:30 p.m., with the notes stating "John called asked
19 if it was OK to share the outlines of a plan. - Doug - 2 mn. severance, continue client
20 building; - Cindy - 1 year salary; -- Discussed gift rules and tax law; -- Shared a plan to
21 have both he and Darlene write ck's in various amounts equaling 96K. - He asked if the
22 offer was OK and did I agree - I said I would need to think about [sic] and would get
23 back with him." Lichtblau Lipton article Exhibit 5, (<http://documents.nytimes.com/in->

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1 wake-of-affair-senator-ensign-may-have-violated-an-ethics-law-2#p=5, last visited
2 January 15, 2010). The article continued that "Mr. Ensign's lawyer in June [2009],
3 however, called the \$96,000 payment that was ultimately made a tax-free gift from Mr.
4 Ensign's parents to the Hamptons 'out of concern for the well-being of longtime family
5 friends during a difficult time.'" Lichtblau Lipton article.

6 Mr. Hampton has publicly reiterated his assertion that the \$96,000 payment was a
7 severance payment, most notably in a November 23, 2009, interview on the television
8 program 'Nightline' and an accompanying article published on ABC News' website
9 (<http://abcnews.go.com/print?id=9140788>, last visited on January 14, 2010). In that
10 article, the payment was discussed as follows: "The Ensign family has said the \$96,000
11 was a gift and not severance... Hampton told 'Nightline' the opposite, saying it was
12 'crystal clear' that the \$96,000 was, in fact, severance and not a gift. 'Crystal clear,'
13 Hampton said. 'I took notes. I've shared those notes. They're well documented. They
14 were clearly what he deemed as severance.'"

15 III. ANALYSIS

16 No person may make contributions⁴ to any candidate and his or her authorized
17 political committee with respect to any election for federal office that exceed \$2,000
18 (adjusted for inflation) per election.⁵ 2 U.S.C. § 441a(a)(1)(A). No person may
19 contribute more than \$5,000 per year to a leadership PAC, such as the Battle Born PAC.
20 2 U.S.C. § 441a(a)(1)(C). Knowing receipt of any excessive contribution is a violation of

⁴ A contribution is any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for federal office. 2 U.S.C. § 431(8)(A)(i).

⁵ During the 2008 election cycle, individuals could contribute up to \$2,300 per election to Federal candidates. See *Price Index Increases for Expenditure and Contribution Limitations*, 72 Fed. Reg. 5294, 5295 (February 5, 2007).

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1 2 U.S.C. § 441a(f). Failure to report receiving a contribution is a violation of 2 U.S.C.
2 § 434(b).

3 Further, contributions accepted by a candidate may not be converted to personal
4 use by any person. 2 U.S.C. § 439a(b)(1); 11 CFR § 113.2(e). "Personal use" is defined
5 as "any use of funds in a campaign account of a present or former candidate to fulfill a
6 commitment, obligation or expense of any person that would exist irrespective of the
7 candidate's campaign or duties as a Federal officeholder." 11 CFR § 113.1(g); *see also* 2
8 U.S.C. § 439a(b)(2).

9 Under the tax code, whether a transfer is considered a "gift" or not is a question of
10 the giver's intent - a gift is any payment made "from a detached and disinterested
11 generosity, out of affection, respect, admiration, charity or like impulses." *Commissioner*
12 *v. Duberstein*, 363 U.S. 278, 285-86 (1960) (citations omitted). Here, the Ensigns'
13 affidavits support Respondents' contention that the transfer was intended as a gift and not
14 as a severance payment. In addition, both the Committee and the PAC directly deny that
15 the monies paid to the Hampton family by Senator Ensign's parents were related to
16 Cynthia Hampton's employment, "nor were they related to any expense or debt that the
17 Committee would have otherwise incurred." Ensign for Senate Response at 7; Battle
18 Born PAC Response at 7. There has also been no allegation that the Committee or the
19 PAC had an obligation to pay Ms. Hampton severance, and no source has provided any
20 information pointing to the existence of any such obligation, such as an employment
21 contract or a history of paying severance to other employees. The amount of money
22 involved, which is equal to almost two full years of Ms. Hampton's salary, would be
23 unusually large for a severance payment. If, in fact, the Committee and the PAC had

13044332308

1 elected to make a severance payment to Ms. Hampton in the amount of \$96,000, the
2 transfer of such a disproportionate sum would have raised personal use issues under 11
3 CFR 113.2(c). If the money the Ensigns paid to the Hamptons was not to fulfill an
4 obligation of the Committee or the PAC, and was given without regard to Ms. Hampton's
5 employment, then the payment did not constitute a contribution—excessive or
6 otherwise—to the Committee or the PAC. See 2 U.S.C. §§ 431(8)(A)(i); 431(b)(8)(ii).
7 Moreover, if the Ensigns' payment of money is not a contribution, then there is also no
8 resulting receipt or reporting violation attributable to the Committee or the PAC. See
9 2 U.S.C. §§ 441a(f) and 434(b).

10 For the reasons discussed above, whether the payment at issue in this matter is a
11 gift or an excessive contribution turns on the intent of the Ensigns in making the
12 payment. Here, the Ensigns have submitted sworn affidavits attesting that the \$96,000
13 payment was a gift, and therefore not a contribution. In addition to these affidavits, the
14 Commission may consider other evidence, including the circumstances in which the
15 payment was made, to discern the Ensigns' intent. See *Commissioner v. Amberstein*, 163
16 U.S. at 286 (observing that "the donor's characterization of his action is not
17 determinative").

18 In this matter, however, the sworn affidavits submitted by the Ensigns constitute
19 the only direct evidence of their intent in making the payment. As a practical matter, it is
20 doubtful that an investigation would produce any additional evidence that would
21 contradict or outweigh this testimony. The Commission already has sworn testimony
22 from the Ensigns; seeking additional testimony from them on the same subject would be
23 duplicative and unnecessary. On the other hand, testimony from other parties, such as the

13044332309

1 Hamptons, would be unlikely to shed any light on the subject of the Ensigns' intent. It is
2 similarly unlikely that an investigation would uncover other circumstantial evidence --
3 such as a writing or statement by the Ensigns to a third party -- that would contradict or
4 outweigh the evidence already before the Commission. Accordingly, we conclude that an
5 investigation in this matter is unwarranted and would not be an efficient use of
6 Commission resources.

7 We, therefore, dismiss this matter as an exercise of our prosecutorial discretion,
8 and close the file. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

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